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No. 06-7517 12-28-06

IN THE SUPREME COURT OF THE UNITED STATES

RICHARD IRIZARRY, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether Federal Rule of Criminal Procedure 32 requires a district court to give the parties advance notice before imposing a sentence outside the applicable advisory Sentencing Guidelines range based on the criteria in 18 U.S.C. 3553(a), when the grounds for the non-Guidelines sentence are not identified in the presentence report or the parties' prehearing submissions.

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OPINION BELOW

The opinion of the court of appeals (Pet. App. 1-9) is reported at 458 F.3d 1208.

JURISDICTION

The judgment of the court of appeals was entered on August 1, 2006. The petition for a writ of certiorari was filed on October 26, 2006. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a guilty plea, petitioner was convicted in the United States District Court for the Southern District of Alabama

of making a threatening interstate communication, in violation of 18 U.S.C. 875(c). He was sentenced to five years of imprisonment, to be followed by three years of supervised release. The court of appeals affirmed his sentence.

1. A grand jury in the Southern District of Alabama returned a superseding indictment that charged petitioner with 15 counts of making a threatening interstate communication, in violation of 18 U.S.C. 875(c). Petitioner pleaded guilty to Count Thirteen of the indictment. In a written factual resume filed during his guilty plea hearing, petitioner admitted the following:

> (1) [Petitioner] sent the e-mail charged in Count Thirteen of the superseding indictment to his ex-wife Leah Smith, threatening to kill her and her new husband; (2) [petitioner] had "sent dozens of other similar e-mails" since his divorce from Ms. Smith in 2001 in violation of a restraining order; (3) the e-mails were "intended by [petitioner] to convey true threats to kill or injure multiple persons;" and (4) [petitioner] "at all times relevant during the commission of this crime . . . acted knowingly and willfully."

Pet. App. 2-3. On the government's motion, the district court dismissed the remaining counts of the indictment. Id. at 3.

The Presentence Investigation Report (PSR) noted that petitioner's offense involved more than two threats, the violation of a court protection order, and conduct evidencing an intent to carry out his threats. PSR ¶¶ 18-20. The PSR also noted that, in January 2005, after petitioner's arrest and detention, he solicited his cellmate, Jack Garris, to kill Kim Metz, his ex-wife's new husband. PSR ¶ 15. Based on all the relevant conduct, the PSR

calculated petitioner's total offense level as 22, which, combined with his criminal history category of I, yielded an advisory Sentencing Guidelines range of 41 to 51 months of imprisonment, to be followed by two to three years of supervised release. PSR ¶¶ 28, 35, 66, 70. The statutory maximum for an offense under 18 U.S.C. 875(c) is five years of imprisonment, to be followed by three years of supervised release. PSR ¶¶ 65, 69.

At the sentencing hearing, Leah Smith, petitioner's ex-wife, testified that petitioner had "terrorized" her and her family. Sent. Tr. 7. Smith stated that she had married petitioner in 1995, that they had a daughter and a son, and that petitioner had physically and mentally abused Smith and their son during the marriage. Id. at 7-8. In 2000, Smith fled from California, where she lived with petitioner, to South Carolina, where she obtained a divorce and a permanent restraining order against him. Pet. App. 3; Sent. Tr. 11. Despite the restraining order, petitioner drove cross-country in a van containing a hammer, rope, tarps, and duct tape, and showed up at Smith's apartment. As a result, petitioner was arrested and imprisoned for violating the restraining order. Pet. App. 3. Because petitioner knew where she lived in South Carolina, Smith moved to Mobile, Alabama, with her children. She later met and married her current husband. Ibid.; Sent. Tr. 13.

Smith testified that she retained an email address that she had had in California. Sent. Tr. 14. Between the divorce in 2001 and petitioner's arrest on the instant charge in December 2003, petitioner sent Smith 255 emails, many of which contained graphic threats to kill Smith, her husband, and her mother. Pet. App. 3. In addition, petitioner called Smith's home in Mobile and, in 2003, sent Smith's husband a Christmas card with a Mobile postmark. Id. at 4.

According to an FBI agent who also testified at the sentencing hearing, when petitioner was arrested in December 2003, his automobile contained a number of items indicating his intent to track down and make contact with his ex-wife or her family. Sent. Tr. 26-28. Those items included "a list of private investigators in Mobile; a print-out from an internet search service showing that a profile of Ms. Smith was available; maps of the Mobile area with notes about the location of Ms. Smith, her children's schools, and her husband's workplace; and cost estimates for travel to Mobile." Pet. App. 4. The FBI agent also testified that, after petitioner was arrested, he made a number of violent and graphic threats against Smith. Sent. Tr. 29. In particular, he stated that he intended "to shoot, car bomb, or decapitate Ms. Smith and her family and to 'leave a trail of blood from here to Alabama' to protect his kids." Pet. App. 4.

Jack Garris also testified at the sentencing hearing. He stated that "[petitioner] told him that Ms. Smith's husband was abusing [petitioner's] children and that [petitioner] intended to kill or hire someone to kill Ms. Smith's husband." Pet. App. 4. Garris also testified that petitioner threatened to kill Smith's mother, whom he blamed for his separation from Smith. Sent. Tr. 36.

Petitioner testified at the sentencing hearing as well. He denied that he had any intent to carry out the threats that he had made against his ex-wife and her family. Pet. App. 4. Petitioner claimed that Garris's testimony was false and that he had never made any threats in front of Garris. See, e.g., Sent. Tr. 52-53.

Petitioner raised various objections to the findings and recommendations in the PSR, but the district court overruled petitioner's objections and, in accordance with the PSR, determined that petitioner's advisory Sentencing Guidelines range was 41 to 51 months of imprisonment. Sent. Tr. 60-67, 70. After considering the sentencing criteria in 18 U.S.C. 3553(a), however, the court declined to sentence petitioner within the advisory Guidelines range. Sent. Tr. 69. Instead, the court sentenced petitioner to the statutory maximum of five years of imprisonment, nine months higher than the top of the Guidelines range. Id. at 70. The court also imposed three years of supervised release and a $100 special assessment. Id. at 70, 72.

The court explained:

> I've considered all of the evidence presented today, I've considered everything that's in the presentence report, and I've considered the statutory purpose of sentencing and the sentencing guideline range. I find the guideline range is not appropriate in this case. I find [petitioner's] conduct most disturbing. I am sincerely convinced that he will continue, as his ex-wife testified, in this conduct, regardless of what this Court does and regardless of what kind of supervision he's under. And based upon that, I find that the maximum time that he can be incapacitated is what is best for society, and therefore the guideline range, I think, is not high enough.

Sent. Tr. 69-70. The court also observed that the "sentence imposed addresses the seriousness of the offense and the sentencing objectives of punishment, deterrence, and incapacitation." Id. at 72.

Petitioner objected that the district court had failed to give notice of its intent to impose an "upward departure" from the applicable Guidelines range. Sent. Tr. 72. The court overruled the objection, observing that petitioner was on "notice that the guidelines were only advisory and the Court could sentence anywhere within the statutory range as defined by the United States Code." Ibid. The court "did not say that it was engaged in an upward departure under the guidelines." Pet. App. 6.

2. In a per curiam opinion, the court of appeals affirmed petitioner's sentence. Pet. App. 1-9. The court noted that Federal Rule of Criminal Procedure 32(h) states that, before a sentencing court "may depart from the applicable sentencing range

on a ground not identified for departure either in the presentence report or in a party's prehearing submission, the court must give the parties reasonable notice that it is contemplating such a departure." Pet. App. 6 (quoting Fed. R. Crim. P. 32(h)). The court further observed that Rule 32(h) is a codification of this Court's holding in Burns v. United States, 501 U.S. 129 (1991). Pet. App. 7. The court of appeals determined, however, that "the above-guidelines sentence imposed by the district court in this case was a variance" based on the court's consideration of the sentencing criteria set forth in 18 U.S.C. 3553(a), "not a guidelines departure." Pet. App. 7.

The court then considered whether Rule 32's notice requirement applies to "a sentence set outside the advisory guidelines range based not on the guidelines' departure provisions, but on a district court's consideration of the section 3553(a) factors." Pet. App. 8. Noting that the courts of appeals have disagreed on that issue, the court of appeals aligned itself with those circuits that have held that the notice requirement does "not apply to such variances." Id. & n.4. The court reasoned that,

> [a]fter [United States v.] Booker, [543 U.S. 220 (2005),] parties are inherently on notice that the sentencing guidelines range is advisory and that the district court must consider the factors expressly set out in section 3553(a) when selecting a reasonable sentence between the statutory minimum and maximum. Given Booker, parties cannot claim unfair surprise or inability to present informed comment -- the Supreme Court's concerns in Burns -- when a district court imposes a sentence above the

guidelines range based on the section 3553(a) sentencing factors.

Pet. App. 9 (internal citation omitted).

ARGUMENT

Petitioner seeks (Pet. 5-10) review of whether Federal Rule of Criminal Procedure 32 requires a district court to give the parties advance notice before imposing a sentence outside the applicable advisory Sentencing Guidelines range based on the criteria in 18 U.S.C. 3553(a) when the grounds for the non-Guidelines sentence are not identified in the PSR or the parties' prehearing submissions. Although there is a conflict among the courts of appeals on that question, this Court's review of the question is not warranted at this time, for three reasons. First, the absence of advance notice had no effect on the outcome of this case. Second, the Judicial Conference is studying the possibility of amending Rule 32 to provide clarification on the notice issue. Third, this Court should not address the notice issue until after its disposition of Claiborne v. United States, No. 06-5618 (cert. granted Nov. 3, 2006), and Rita v. United States, No. 06-5754 (cert. granted Nov. 3, 2006), because the decisions in those cases may shed light on the correct resolution of the issue.

1. a. In Burns v. United States, 501 U.S. 129 (1991), this Court construed a prior version of Rule 32 to require a sentencing court to give notice to the parties before departing sua sponte from the applicable Guidelines range. 501 U.S. at 135-139; see id.

at 135 n.4 (stating that the notice requirement applies to both upward and downward departures). The Court acknowledged that the rule contained no "express language" requiring advance notice of sua sponte departures. Id. at 132; see id. at 136. The Court concluded, however, that notice was implicitly required by the rule's mandate that the parties have "an opportunity to comment upon the probation officer's determination [in the PSR] and on other matters relating to the appropriate sentence." Id. at 135 (quoting Fed. R. Crim. P. 32(a)(1) (1990)). The Court reasoned that whether a sua sponte departure from the Guidelines is warranted is "[o]bviously * * * a 'matte[r] relating to the appropriate sentence,'" and "it makes no sense to impute to Congress an intent that a defendant have the right to comment on the appropriateness of a sua sponte departure but not the right to be notified that the court is contemplating such a ruling." Id. at 135-136 (quoting Fed. R. Crim. P. 32(a)(1) (1990)).

The Court also reasoned that reading Rule 32 to dispense with notice would be inconsistent with the rule's "purpose of promoting focused, adversarial resolution of the legal and factual issues relevant to fixing Guidelines sentences." Burns, 501 U.S. at 137. Finally, the Court relied on the doctrine of constitutional avoidance, noting that, if the Court "read Rule 32 to dispense with notice, [the Court] would then have to confront the serious

question whether notice in this setting is mandated by the Due Process Clause." Id. at 138.

In 2002, Rule 32 was amended by the addition of a new subsection that expressly codified the Court's holding in Burns. That subsection provides that the district court, before it "depart[s] from the applicable sentencing range on a ground not identified for departure either in the [PSR] or in a party's prehearing submission, * * * must give the parties reasonable notice" of "any ground on which the court is contemplating a departure." Fed. R. Crim. P. 32(h). At the same time, the language on which the Court relied in Burns was retained and designated as Rule 32(i)(1)(C). See Fed. R. Crim. P. 32(i)(1)(C) (stating that the sentencing court "must allow the parties' attorneys to comment on the probation officer's determinations and other matters relating to an appropriate sentence").

b. This Court subsequently decided United States v. Booker, 543 U.S. 220 (2005), which rendered the Sentencing Guidelines advisory rather mandatory. Since Booker, courts have considered whether Rule 32's notice requirement applies not only to a departure under the Guidelines but also to a decision by a sentencing court to exercise its post-Booker discretion to impose a non-Guidelines sentence based on the criteria in 18 U.S.C. 3553(a). In the government's view, Rule 32's notice requirement applies to such a decision.

Although Rule 32(h) refers only to "departures," Fed. R. Crim. P. 32(h), Rule 32 elsewhere continues to mandate that the district court allow the parties "to comment on * * * matters relating to an appropriate sentence," Fed. R. Crim. P. 32(i)(1)(C). As described above, this Court concluded in Burns that the mandate that the parties be allowed to comment on sentencing matters requires that they receive notice of sua sponte departures. The same reasoning that led this Court to that conclusion also indicates that notice is required before a sentencing court may impose a non-Guidelines sentence based on the criteria in 18 U.S.C. 3553(a). Just like a departure, a decision to impose a non-Guidelines sentence under Section 3553(a) is "[o]bviously" a "matte[r] relating to the appropriate sentence," and "it makes no sense to impute to Congress an intent that a defendant have the right to comment on the appropriateness of [that decision] but not the right to be notified that the court is contemplating such a ruling." Burns, 501 U.S. at 135-136.

The other reasons for the notice requirement recognized in Burns also support the conclusion that the requirement extends to notice that the sentencing court is contemplating a non-Guidelines sentence under Section 3553(a). By construing Rule 32 to require notice before imposition of non-Guidelines sentence under Section 3553(a), courts avoid the constitutional issue whether notice is

required by due process. See Burns, 501 U.S. at 138. In addition, notice promotes Rule 32's goal of "full adversarial testing of the issues relevant" to sentencing. Id. at 135. Even under the post-Booker advisory Guidelines system, determination of the Guidelines range remains the "starting point for constructing a defendant's sentence." United States v. Dixon, 449 F.3d 194, 204 (1st Cir. 2006).[1] Although the parties know that the sentencing court will consider the Section 3553(a) factors and may impose a sentence outside the Guidelines range based on those factors, "application of those factors turns on relevant facts, some of which might be in the [c]ourt's mind but not previously disclosed." United States v. Anati, 457 F.3d 233, 237 (2d Cir. 2006). If the PSR and the parties' submissions have not discussed the matter, the parties need notice of the grounds on which the court is considering imposing a non-Guidelines sentence in order to ensure the full airing of the issues that will determine the sentence. Ibid.; United States v. Evans-Martinez, 448 F.3d 1163, 1167 (9th Cir. 2006).

2. As petitioner observes (Pet. 6-7), the courts of appeals have taken differing views on whether notice is required before a court may impose a non-Guidelines sentence based on the criteria in

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[1] See, e.g., United States v. Anati, 457 F.3d 233, 236 (2d Cir. 2006); United States v. Jointer, 457 F.3d 682, 686 (7th Cir. 2006), petition for cert. pending (filed Oct. 27, 2006); United States v. Cantrell, 433 F.3d 1269, 1280 (9th Cir. 2006); United States v. Terrell, 445 F.3d 1261, 1264 (10th Cir. 2006).

Section 3553(a). The Second, Fourth, Sixth, and Ninth Circuits have held that notice is required. See Anati, 457 F.3d at 235-237; United States v. Davenport, 445 F.3d 366, 371 (4th Cir. 2006); United States v. Cousins, 2006 WL 3435608,, at *5-*7 (6th Cir. Nov. 30, 2006); Evans-Martinez, 448 F.3d at 1166-1167. The Third, Seventh, Eighth, and Eleventh Circuits have held to the contrary. See United States v. Vampire Nation, 451 F.3d 189, 195-196 (3d Cir.), cert. denied, 127 S. Ct. 424 (2006); United States v. Walker, 447 F.3d 999, 1006 (7th Cir.), cert. denied, 127 S. Ct. 314 (2006); United States v. Long Solider, 431 F.3d 1120, 1122 (8th Cir. 2005); Pet. App. 8-9.[2]

Despite the conflict among the courts of appeals, this Court's review is not warranted in this case. The absence of advance notice that the district court was contemplating a sentence outside the Guidelines range had no impact on the outcome of petitioner's sentencing proceeding. The district court varied upwards because the court was convinced that petitioner would continue to harass his ex-wife and needed to be incapacitated for as long as the law would allow. Petitioner's past conduct was detailed in the PSR. The PSR explained that petitioner had made numerous graphic and violent threats against his ex-wife and her family, repeatedly

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[2] In an unpublished decision, the First Circuit has held that a failure to give notice before imposing a variance from the advisory Guidelines range is not plain error given the circuit split on the issue. United States v. Mateo, 2006 WL 1195676, at *1 (May 5, 2006).

violated a court protection order by contacting her, and, even after he was arrested, had told his cellmate that he intended to kill or to hire someone to kill his ex-wife's new husband. The district court relied on the same or similar evidence presented at the sentencing hearing in determining that petitioner would "continue" in his threatening conduct and that therefore the "maximum time that he can be incapacitated is what is best for society." Sent. Tr. 69-70. Petitioner has never pointed to any additional evidence he would have introduced or argument he would have made if he had known before the sentencing hearing that the district court intended to impose a non-Guidelines sentence on that basis. And the sentence imposed, which was the statutory maximum, was only nine months higher than the top of the advisory Guidelines range. The outcome of this case thus would have been no different if petitioner had been provided with advance notice of the district court's intention to impose a non-Guidelines sentence, and further review of the case is not warranted.

This Court's review of the notice issue is also not warranted at this time because the Judicial Conference is studying the possibility of amending Rule 32 to provide clarification on the issue. The Committee on Rules of Practice and Procedure of the Judicial Conference recently circulated for public comment a proposal to amend Rule 32(h) to require a sentencing court to provide notice to the parties of any ground for imposing a non-

Guidelines sentence not previously identified in the PSR or by the parties. "After discussion at the Standing Committee of recent decisions taking various approaches to the question whether notice must be given, the proposed amendment to subdivision (h) was withdrawn to permit further study." See Committee on Rules of Practice and Procedure, Report of the Judicial Conference (Sept. 2006), Appendix H at 3. If, after that further study, the Conference decides to clarify the Rule, this Court's intervention would be unnecessary.

Finally, review would also be premature at this juncture because cases currently pending before the Court may shed light on the proper resolution of the notice issue. The Court recently granted certiorari in Claiborne v. United States, No. 06-5618 (cert. granted Nov. 3, 2006), and Rita v. United States, No. 06-5754 (cert. granted Nov. 3, 2006), to address several questions about post-Booker sentencing. The decisions in those cases are likely to clarify the role of the Sentencing Guidelines in the post-Booker sentencing regime. The decisions therefore may provide insight into the importance that notice of a court's intention to impose a non-Guidelines sentence has for achieving Rule 32's goal of full adversary testing of the issues relevant to sentencing.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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